No. 04-366

Supreme Court, U.S.
FILED
DEC 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Petitioners,

v.

BERNARD J. EBBERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM S. LERACH
DARREN J. ROBBINS
ERIC ALAN ISAACSON
MICHAEL J. DOWD
SPENCER A. BURKHOLZ
JOSEPH D. DALEY *
LERACH COUGHLIN STOIA
GELLER RUDMAN &
ROBBINS LLP
401 B Street, Suite 1600
San Diego, CA 92101
(619) 231-1058

PATRICK J. COUGHLIN
RANDI D. BANDMAN
AZRA Z. MEHDI
LERACH COUGHLIN STOIA
GELLER RUDMAN &
ROBBINS LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111
(415) 288-4545

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 04-366

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Petitioners,

v.

BERNARD J. EBBERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Try as respondents may to discount this Court's *ratio decidendi* in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), the opinion turned on critical textual differences between the Fair Labor Standards Act on the one hand, and provisions such as Securities Act §22(a), on the other, demonstrating that "[w]hen Congress has 'wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms.'" *Id.* at 697 (citation omitted). In this case, the Second Circuit ruled the opposite, that with §22(a) Congress never "intended to give individual plaintiffs an *absolute* choice of forum for claims brought under the 1933 Act." 29a (panel's emphasis).

Respondents suggest that many decisions predating *Breuer* similarly held that §22(a) affords no absolute choice of forum: "A line of cases addressing removal under 28 U.S.C.

§1441(c) holds, for example, that Securities Act claims may be removed notwithstanding the express bar of Section 22(a)." Respondents' Opp. at 13. Yet every one of the three cases they cite applied §1441(c)'s provision that when a removable claim "*is joined with one or more otherwise nonremovable claims* or causes of action, *the entire case may be removed* and the district court may determine all issues therein." 28 U.S.C. §1441(c) (emphasis added); *see, e.g., Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020, 1021-22 (2d Cir. 1984); *U.S. Indus., Inc. v. Gregg*, 348 F. Supp. 1004, 1015 (D. Del. 1972), *rev'd on other grounds*, 540 F.2d 142 (3d Cir. 1976); *Farmers & Merchants Bank v. Hamilton Hotel Partners Ltd. P'ship*, 702 F. Supp. 1417, 1420 (W.D. Ark. 1988). These decisions are all beside the point, since the bankruptcy-removal statute involved here contains no similar provision, and because the nonremovable Securities Act claims in this case were never joined with removable claims of any kind. And *Gonsalves* does not even mention the Securities Act, let alone hold that Securities Act claims may be removed to federal court.

Finally, respondents try to discount the many district court decisions that—contrary to the Second Circuit's view—hold Securities Act §22(a) requires that Securities Act cases removed to federal court as "related to" bankruptcy proceedings under 28 U.S.C. §1452 must be remanded to state court. First, respondents say that all these district court decisions may safely be ignored—on the ground that certiorari ought to be granted only "to establish uniformity of federal law among courts whose decisions on matters of federal law are final in the absence of this Court's review." Respondents' Opp. at 16. "In the first instance," respondents insist, "the courts of appeals are charged with attempting to establish that uniformity." *Id.*

Yet the Seventh Circuit recently ruled—in a related case—that "the courts of appeals have no power to bring consistency

to these remand orders." *Ill. Mun. Ret. Fund ("IMRF") v. Citigroup, Inc.*, No. 03-3703, slip op. at 12 (7th Cir. Dec. 2, 2004) (reprinted in the Reply Appendix filed herewith, at 1ra-14ra). The circuit courts lack power to review any of these remands, entered under Securities Act §22, because 28 U.S.C. §1447(d) flatly bars appellate review of a district court's decision remanding an action when the basis for remand is either a defect in removal procedure brought to the district court's attention by a timely motion to remand, or defective subject-matter jurisdiction (whenever and however it comes to the district court's attention). *See* 28 U.S.C. §1447(d). Thus, district court orders remanding securities cases based on §22(a) are, quite simply, unreviewable—even when the party seeking removal insists that they are "related to" bankruptcy proceedings under §1452, and even when the result is inconsistent rulings in important multidistrict litigation. *See, e.g., IMRF*, slip op. at 12 (12ra); *see also Ariail Drug Co. v. Recomm Int'l Display*, 122 F.3d 930, 930-34 (11th Cir. 1997). The conflict among the precedents thus amounts to one among the highest courts permitted to consider the issue presented.

The point can hardly be lost on respondents—who in case after case have been told that appellate courts lack jurisdiction to reach the merits of their appeals challenging remand orders in similar and closely related cases. *See, e.g., Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, Nos. 03-5785/5786 (6th Cir. Nov. 4, 2003) (reprinted in the Reply Appendix hereto, at 15ra-19ra); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, No. 02-15385 (11th Cir. June 18, 2003) (reprinted in the Reply Appendix hereto, at 20ra-22ra), *cert. denied*, 124 S. Ct. 1039 (2004).

The Seventh Circuit's *IMRF* decision is merely the most recent of these. In it, the Seventh Circuit explained that its application of §1447(d) necessarily

> creates a "one-bite-at-the apple scheme," under which inconsistent jurisdictional decisions by district courts cannot be brought in line through the appellate process. Even clear errors in a district court's jurisdictional analysis may not be corrected by the courts of appeals if the district court *thought* that it lacked subject matter jurisdiction.

IMRF, slip op. at 12 (12ra) (citation omitted; court's emphasis). Thus, it concluded, "the courts of appeals have no power to bring consistency to these remand orders." *Id.*

That being so, the conflict presented by the existing precedents clearly is ripe for this Court's intervention—presenting the functional equivalent of a conflict among the circuits, which the circuits themselves have been unable to resolve.

Respondents suggest that the various district courts' unreviewable orders all may be ignored, however, for the further reason that the decisions applying §22(a) as written usually are fairly brief—and therefore "devoid of analysis." But what would you expect of decisions that apply clear statutory text as written? Such simplicity of decision is to be expected when a court is charged with interpreting and applying a clear statute. The decisions are both brief *and sound*.

Respondents acknowledge, however, that the district court opinion in *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, 2003 U.S. Dist. LEXIS 10266 (M.D. Tenn. May 9, 2003), addressed their arguments at some length before dismissing them. When respondents filed a motion asking the district court to reconsider its conclusions in light of the Second Circuit's opinion in *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004), moreover, the district court issued *a further opinion*, that respondents acknowledge only in a footnote. Respondents' Opp. at 17 n.2. The new opinion grapples with points in the Second Circuit's opinion—explaining precisely how the Second Circuit went wrong. It is attached to the Reply

Appendix hereto, at 24ra-35ra, and explains in detail how "the Second Circuit decision misapplies Supreme Court precedent," and misuses "a rule of statutory construction to set aside a clear statutory mandate." 26ra; *see* 26ra-35ra.

Thus, this case presents an important precedential conflict on a clearly framed issue. It is a conflict that the circuit courts have found themselves disabled, by 28 U.S.C. §1447(d), from considering, let alone resolving. *See IMRF*, slip op. at 12 (12ra). Review by certiorari not only is warranted—it is needed.

Respectfully submitted,

WILLIAM S. LERACH
DARREN J. ROBBINS
ERIC ALAN ISAACSON
MICHAEL J. DOWD
SPENCER A. BURKHOLZ
JOSEPH D. DALEY *
LERACH COUGHLIN STOIA
GELLER RUDMAN &
ROBBINS LLP
401 B Street, Suite 1600
San Diego, CA 92101
(619) 231-1058

PATRICK J. COUGHLIN
RANDI D. BANDMAN
AZRA Z. MEHDI
LERACH COUGHLIN STOIA
GELLER RUDMAN &
ROBBINS LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111
(415) 288-4545

* Counsel of Record

Counsel for Petitioners

December 14, 2004